# Kee Boon Suan & Ors v Adventist Hospital & Clinical Services (M) & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-02(NCVC)(W)-1384–08 OF 2015, P-02(NCVC)(W)-1385–08 OF 2015, P-02(NCVC)(W)-1401–08 OF 2015 AND P-02(NCVC)(IM)-290–02 OF 2016

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*Tort — Negligence — Medical negligence — Whether trial court wrongly found hospital negligent and liable to pay damages to patient who became quadriplegic after surgery — Whether doctors who performed surgery clearly negligent in not using essential monitoring equipment normally used in such operations — Whether doctor also negligent at pre-operation stage in not informing patient's father of risk of quadriplegia upon surgery and in recommending surgery as first option although patient's condition not serious — Whether surgeons involved not employees or agents of hospital but independent contractors — Whether evidence showed hospital played no role in causing patient's condition — Whether patient and family never pleaded causation against hospital but only against doctors concerned — Whether hospital not liable either vicariously or for breach of non-delegable duty of care to patient — Whether doctrine of non-delegable duty of care had to be expressly pleaded before it could be relied upon*

The day after two orthopaedic surgeons ('Dr Cheok' and 'Dr Wong'), assisted by an anaesthetist ('Dr Patrick'), operated on an active 12 years old girl ('Jun Hui') to straighten her slightly crooked spine at the Adventist Hospital & Clinical Services (M) ('the hospital'), the girl's condition rapidly deteriorated and she became a quadriplegic, paralysed from the neck down and dependent on a ventilator for breathing. Prior to the operation, Jun Hui's parents, Boon Suan and Mooi Sim, had come to know about Dr Cheok through a newspaper article and they requested him to examine Jun Hui and find a solution for her spinal deformity. Dr Cheok recommended surgery and the parents agreed. Dr Cheok obtained the hospital's approval for Dr Wong, who was then working in another hospital, to assist him in the surgery. Although it was normal practice in such surgery for a spinal cord monitoring ('SCM') device to be used to prevent damage to the spinal cord from overstretching of the spinal column, Dr Cheok and Dr Wong did not use the device during the surgery and did not request the hospital to provide the device either. Immediately following the surgery, when Jun Hui was in the intensive care unit ('ICU'), she was able to move her legs at Dr Cheok's command. But the following day, after she was transferred to the general ward, her condition rapidly deteriorated. She

collapsed, was resuscitated and moved back to the ICU and put on a ventilator. Jun Hui was unable to move her body. Tests showed she had suffered spinal cord damage. Jun Hui continued to remain in the hospital. Five years after the surgery, the hospital sued her parents for unpaid medical bills amounting to RM2,350,013.85 incurred for her care, management and treatment. The parents added Jun Hui to the suits and counterclaimed, inter alia, for RM6,023,802 in general damages (for pain and suffering and loss of amenities of life) against the hospital, Dr Cheok, Dr Wong and Dr Patrick for medical negligence. The High Court allowed both the hospital's claim on the unpaid bills as well as the family's counterclaim. The decision resulted in the instant four appeals which included: (a) Jun Hui's and her parents' appeal against the allowing of the hospital's claim on the unpaid hospital bills and the dismissal of their counterclaim for refund of a RM20,000 deposit they had paid for the surgery; (b) appeals by Dr Cheok, Dr Wong and Dr Patrick against the finding that they were negligent and also against damages awarded against them; and (c) the hospital's appeal against liability and quantum following the finding that it was liable vicariously for the acts/omissions of the doctors concerned and/or for breach of a non-delegable duty of care it owed Jun Hui.

**Held**, dismissing Appeal Nos 1384, 1385 and 290 and allowing Appeal No 1401, and, inter alia, holding Dr Cheok 65% liable and Dr Wong 35% liable for the negligence occasioned to Jun Hui; holding Dr Patrick and the hospital not negligent and reducing the multiplier to be used in computing the quantum of damages, wherever applicable, from 21.4 to 13:

(1) There was no merit in the appeal by Jun Hui and her parents against the hospital's claim for the RM2,350,013.85 in unpaid medical bills. They not only did not dispute the hospital's claim but had agreed to it in their submissions (see para 45).

(2) The High Court erred in holding that the hospital was vicariously liable for the alleged negligence of the doctors. The contract between the parties showed that Dr Cheok and Dr Patrick were independent contractors and not agents or employees of the hospital. They operated independent businesses free from control, interference and/or obstruction from the hospital's management. Both Dr Cheok and Dr Patrick had specifically pleaded that they were independent contractors. Dr Wong was not an employee of the hospital at all but was brought in, with the hospital's approval, by Dr Cheok to help in the surgery. The hospital could also not be made liable for not providing the SCM facilities as Dr Cheok and Dr Wong had never requested for them in the first place. In any case, there was no causal link or causation proved by Jun Hui and her parents against the hospital. Causation was only pleaded against the three doctors and not against the hospital (see paras 51–52, 77 & 79).

A (3) The High Court wrongly found that the hospital was liable under the doctrine of non-delegable duty of care because that issue was never pleaded and therefore should not have been considered. For that doctrine to operate there had to have been an antecedent relationship between the hospital and Jun Hui but there was no evidence of one. Jun Hui's parents B had sought the services of Dr Cheok after reading about him in a newspaper. The hospital did not, thorough its own internal system, select Dr Cheok and Dr Wong to perform the surgery (see paras 55–56).

(4) There was no evidence to hold Dr Patrick liable for negligence C notwithstanding the high risk that was involved when Jun Hui underwent the surgery in a prone position and was subjected to 'hypotensive anaesthesia'. It was wrong to conclude that she became a quadriplegic because she was put in that position. Applying the 'but for' test, but for the surgery that was done without the use of the SCM D facilities, the mere act of putting the patient in the prone position for administration of anaesthesia would not by itself have caused the quadriplegia (see paras 64 & 69–70).

(5) The High Court was right to find both Dr Cheok and Dr Wong E negligent in performing the surgery without the SCM facilities. This court found Dr Cheok 65% liable and Dr Wong 35% liable. Their appeal against quantum of damages was dismissed except that the multiplier of 21.4 years was reduced to 13 years for the various items awarded, wherever applicable. The X-rays and MRI on Jun Hui clearly showed that F her quadriplegia was caused by Dr Cheok's and Dr Wong's negligence. In addition, at the pre-operation stage, Dr Cheok had breached his duty of care when he recommended surgery instead of choosing to monitor Jun Hui's condition over a period of time since her deformity was not even a cosmetic one and she was able to participate in school activities. Dr Cheok was also negligent in failing to inform Jun Hui's father of the G inherent and material risk of quadriplegia if the surgery was undertaken (see paras 36–37, 60–61 & 68).

(6) With regard to quantum of damages, the appropriate multiplier to be used wherever applicable ought to be 13 years (instead of the 21.4 years H as imposed by the High Court) based on a life expectancy of 37.3 years for a patient who was ventilator-dependent like Jun Hui (see paras 82 & 86).

**[Bahasa Malaysia summary**

I Sehari selepas dua pakar bedah ortopedik ('Dr Cheok' dan 'Dr Wong'), dibantu oleh seorang pakar bius ('Dr Patrick'), membedah seorang gadis berusia 12 tahun yang aktif ('Jun Hui') untuk meluruskan tulang belakangnya yang sedikit bengkok di Hospital Adventist & Perkhidmatan Klinikal ('hospital'), keadaan gadis itu semakin merosot dan dia menjadi *quadriplegic*,

lumpuh dari leher ke bawah dan bergantung pada ventilator untuk bernafas. Sebelum pembedahan itu, ibu bapa Jun Hui, Boon Suan dan Mooi Sim, telah mengetahui tentang Dr Cheok melalui artikel akhbar dan mereka meminta dia untuk memeriksa Jun Hui dan mencari penyelesaian untuk kecacatan tulang belakangnya. Dr Cheok mengesyorkan pembedahan dan ibu bapa bersetuju. Dr Cheok mendapat kelulusan hospital untuk Dr Wong, yang pada masa itu bekerja di hospital lain, untuk membantunya menjalani pembedahan. Walaupun ia amalan biasa dalam pembedahan untuk alat pemantauan saraf tunjang ('PST') digunakan bagi mengelak kerosakan pada saraf tunjang dari terlalu meregang ruang tulang belakang, Dr Cheok dan Dr Wong tidak menggunakan peranti semasa pembedahan dan tidak juga meminta hospital untuk menyediakan peranti itu. Sejurus selepas menjalani pembedahan, ketika Jun Hui berada di unit rawatan intensif ('ICU'), dia dapat menggerakkan kaki atas arahan Dr Cheok. Namun bagitu pada keesokan harinya, selepas dia dipindahkan ke wad biasa, keadaannya semakin merosot. Dia tidak bernafas, telah diresusitasi dan dipindahkan balik ke ICU dan dipasangkan ventilator. Jun Hui tidak dapat menggerakkan tubuhnya. Ujian menunjukkan dia mengalami kerosakan saraf tunjang. Jun Hui terus kekal di hospital. Lima tahun selepas pembedahan itu, pihak hospital menyaman ibu bapanya dengan bil perubatan berjumlah RM2,350,013.85 yang ditanggung untuk menjaga, mengurus dan merawatannya. Kedua-dua ibu bapa telah menambah Jun Hui kepada guaman itu dan menuntut balas, antara lain, untuk RM6,023,802 ganti rugi am (untuk kesakitan dan penderitaan dan kehilangan kemudahan hidup) terhadap hospital, Dr Cheok, Dr Wong dan Dr Patrick kerana kecuaian perubatan. Mahkamah Tinggi membenarkan kedua-dua tuntutan hospital mengenai bil yang belum dibayar serta tuntutan balas keluarga. Keputusan itu menyebabkan empat rayuan ini: (a) rayuan Jun Hui dan ibu bapanya kerana membenarkan tuntutan hospital terhadap bil hospital yang belum dibayar dan penolakan tuntutan balas mereka untuk bayaran balik deposit RM20,000 yang telah mereka bayar untuk pembedahan; (b) rayuan oleh Dr Cheok, Dr Wong dan Dr Patrick terhadap dapatan bahawa mereka cuai dan juga terhadap ganti rugi yang diawardkan terhadap mereka; dan (c) rayuan hospital terhadap liabiliti dan kuantum berikutan dapatan bahawa ia bertanggungjawab secara vikarius untuk perbuatan/peninggalan doktor yang berkenaan dan/atau pelanggaran kewajiban penjagaan yang tidak boleh diwakilkan kepada Jun Hui.

**Diputuskan**, menolak Rayuan No 1384, 1385 dan 290 dan membenarkan Rayuan No 1401, dan, antara lain, memutuskan Dr Cheok bertanggungjawab 65% dan Dr Wong bertanggungjawab 35% kerana kecuaian yang disebabkan ke atas Jun Hui; memutuskan Dr Patrick dan hospital tidak cuai dan mengurangkan pengganda digunakan untuk mengira kuantum ganti rugi, yang mana terpakai, daripada 21.4 hingga 13:

(1) Tiada merit dalam rayuan oleh Jun Hui dan ibu bapanya terhadap

tuntutan hospital itu untuk RM2,350,013.85 dalam bil perubatan yang tidak dibayar. Mereka bukan sahaja tidak mempertikaikan tuntutan hospital tetapi telah bersetuju dengannya dalam penghujahan mereka (lihat perenggan 45).

(2) Mahkamah Tinggi terkhilaf dalam memutuskan bahawa hospital bertanggungjawab secara vikarius ke atas kecuaian doktor yang dikatakan itu. Kontrak antara pihak-pihak menunjukkan bahawa Dr Cheok dan Dr Patrick adalah kontraktor bebas dan bukan ejen atau pekerja hospital. Mereka mengendalikan perniagaan bebas yang bebas daripada kawalan, gangguan dan/atau halangan dari pengurusan hospital. Kedua-dua Dr Cheok dan Dr Patrick secara khusus mengaku bahawa mereka adalah kontraktor bebas. Dr Wong bukanlah pekerja hospital sama sekali tetapi dibawa masuk, dengan kelulusan hospital, oleh Dr Cheok untuk membantu dalam pembedahan. Hospital itu juga tidak boleh dipertanggungjawabkan kerana tidak menyediakan kemudahan PST memandangkan Dr Cheok dan Dr Wong tidak pernah memintanya pada awal lagi. Walau apa pun, tidak ada kaitan sebab akibat atau penyebab dibuktikan oleh Jun Hui dan ibu bapanya terhadap hospital. Penyebab hanya dipli terhadap tiga doktor tersebut dan bukan terhadap hospital (lihat perenggan 51–52, 77 & 79).

(3) Mahkamah Tinggi telah salah kerana mendapati bahawa hospital itu bertanggungjawab di bawah doktrin kewajipan penjagaan yang tidak boleh diwakilkan kerana isu itu tidak pernah dipohon dan oleh itu tidak boleh dipertimbangkan. Untuk doktrin itu beroperasi perlu ada hubungan antecedent antara hospital dan Jun Hui tetapi tiada bukti sedemikian. Ibu bapa Jun Hui telah meminta perkhidmatan Dr Cheok selepas membaca tentangnya dalam akhbar. Hospital itu tidak, melalui sistem dalamannya sendiri, memilih Dr Cheok dan Dr Wong untuk melakukan pembedahan itu (lihat perenggan 55–56).

(4) Tiada keterangan untuk memutuskan Dr Patrick bertanggungjawab atas kecuaian itu walau apa pun risiko tinggi yang terlibat apabila Jun Hui menjalani pembedahan dalam kedudukan yang terdedah dan tertakluk kepada 'hypotensive anaesthesia'. Adalah salah untuk membuat kesimpulan bahawa dia menjadi *quadriplegic* kerana dia diletakkan dalam keadaan itu. Dengan mengguna pakai ujian 'but for', tetapi untuk pembedahan yang dilakukan tanpa penggunaan kemudahan PST itu, perbuatan meletakkan pesakit dalam keadaan yang terdedah untuk pentadbiran anestesia tidak dengan sendirinya telah menyebabkan quadriplegia (lihat perenggan 64 & 69–70).

(5) Mahkamah Tinggi adalah betul kerana mendapati kedua-dua Dr Cheok dan Dr Wong cuai dalam melakukan pembedahan itu tanpa kemudahan PST. Mahkamah mendapati Dr Cheok bertanggungjawab 65% dan Dr Wong bertanggungjawab 35%. Rayuan mereka terhadap kuantum

ganti rugi telah ditolak kecuali pengganda sebanyak 21.4 tahun telah dikurangkan kepada 13 tahun untuk pelbagai butiran yang diawardkan, di mana yang berkenaan. X-ray dan MRI ke atas Jun Hui jelas menunjukkan bahawa keadaan quadriplegianya disebabkan oleh kecuaian Dr Cheok dan Dr Wong. Di samping itu, pada peringkat pra-operasi, Dr Cheok telah melanggar kewajipannya apabila dia mencadangkan pembedahan dan bukan memilih untuk mengawasi keadaan Jun Hui sepanjang tempoh masa kerana kecacatannya bukan bersifat kosmetik dan dia dapat mengambil bahagian dalam kegiatan sekolah. Dr Cheok juga cuai kerana tidak memberitahu ibu Jun Hui tentang risiko sedia ada dan material berhubung quadriplegia jika pembedahan dijalankan (lihat perenggan 36–37, 60–61 & 68).

(6) Berhubung kuantum ganti rugi, pengganda yang sesuai untuk digunakan di mana-mana yang terpakai mestilah 13 tahun (bukan 21.4 tahun yang dikenakan oleh Mahkamah Tinggi) berdasarkan jangka hayat 37.3 tahun untuk pesakit yang bergantung kepada ventilator seperti Jun Hui (lihat perenggan 82 & 86).]

**Notes**

For cases on medical negligence, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1657–1676.

**Cases referred to**

*Cassidy v Ministry of Health* [1951] 2 KB 343, CA (refd)

*Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 10 CLJ 529, FC (folld)

*Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593; [2007] 1 CLJ 229, FC (refd)

*Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1, FC (consd)

*Tun Hussein Onn National Eye Hospital v Megat Noor Ishak bin Megat Ibrahim & 2 Others* Civil Appeal No 01(f)–26–04 of 2015(W) (unreported), FC (refd)

*Various Claimants v Catholic Child Welfare Society and others* [2013] 2 AC 1, SC (refd)

**Appeal from:** Civil Suit Nos 22NCVC–85–02 of 2013 and 22NCVC–307–10 of 2013 (High Court, Pulau Pinang)

*Cecil Abraham (JJ Chan and Joyce Tam with him) (Chan Ban Eng & Co) in Civil Appeal Nos P-02(NCVC)(IM)-290–02 of 2016 and P-02(NCVC)(W)-1401–08 of 2015 for the appellant.*

*Rhina Bhar (KB Karthi and Evan Lee with him) (Rhina Bhar & Assoc) in Civil*

*Appeal No P-02(NCVC)(W)-1384–08 of 2015 for the appellant.*
*Nurulhuda Mansor (Shearn Delamare & Co) in Civil Appeal No P-02(NCVC)(W)-1385–08 of 2015 for the appellant.*
*Cecil Abraham (JJ Chan and Joyce Tam with him) (Chan Ban Eng & Co) in Civil Appeal No P-02(NCVC)(W)-1384–08 of 2015 for the respondent.*
*Nurulhuda Mansor (Shearn Delamare & Co) in Civil Appeal No P-02(NCVC)(W)-1384–08 of 2015 for the respondents.*
*Rhina Bhar (KB Karthi and Evan Lee with him) (Rhina Bhar & Assoc) in Civil Appeal Nos P-02(NCVC)(W)-1401–08 of 2015, P-02(NCVC)(IM)-290–02 of 2016 and P-02(NCVC)(W)-1385–08 of 2015 for the respondents.*

**Yeoh Wee Siam JCA (delivering judgment of the court):**

INTRODUCTION

The following four civil appeals ('the four appeals') were heard before us:

(a) Appeal No P-02(NCVC)(W)-1384–08 of 2015 ('Appeal No 1384');

(b) Appeal No P-02(NCVC)(W)-1385–08 of 2015 ('Appeal No 1385');

(c) Appeal No P-02(NCVC)(W)-1401–08 of 2015 ('Appeal No 1401'); and

(d) Appeal No P-02(1M)(NCVC)-290–02 of 2016 ('Appeal No 290').

**[1]** The four appeals arose from the Penang High Court ('High Court') decision in respect of Civil Suit No 22NCVC–85–02 of 2013 ('Suit 85') consolidated with Civil Suit No 22NCVC–307–10 of 2013 ('Suit 307').

BACKGROUND FACTS

*The parties*

**[2]** The plaintiff, Adventist Hospital & Clinic Services (M) ('the hospital'), commenced Suit 85 and Suit 307 ('the two suits' or 'original action') for unpaid medical bills against the first and second defendants, namely Kee Boon Suan ('patient's father'), and Ang Mooi Sim ('patient's mother') ('patient's parents') in respect of the care, management and treatment of their daughter, Kee Jun Hui ('patient'), at the hospital.

**[3]** In response to the hospital's above two suits, the patient's parents and the patient filed the defence and made a counterclaim for damages for medical negligence ('negligence') against the three doctors and the hospital.

**[4]** The three doctors are:

(a) Dr Cheok Chee Yew ('Dr Cheok') and Dr Wong Chung Chek ('Dr Wong'), consultant orthopaedic surgeons, who are the second and fourth defendants respectively in the counterclaim. Both Dr Cheok and Dr Wong carried out the operation on the patient at the hospital; and

(b) Dr Patrick Tan K S ('Dr Patrick'), the anaesthetist assigned by the hospital for the said operation. He is the third defendant in the counterclaim.

**[5]** For ease of identification for the purposes of these four appeals, we would refer to the parties according to their abbreviated names.

*Salient facts*

The hospital's original action against the patient's parents on outstanding medical bills

**[6]** On 2 June 2008, the patient was admitted to the hospital for spinal surgery which was scheduled on 3 June 2008.

**[7]** The patient's parents had financial difficulties to bear the costs for the surgery. Therefore the hospital, under the Dr Earl Gardner Fund, agreed to contribute RM55,000 towards the cost of the surgery which was about RM70,000. Subsequently, the hospital agreed to grant a 30% coverage of the medical bills under the Sabbath Fund for a period of one year which was until 26 May 2009.

**[8]** The hospital did not impose any charges against the defendants until after the expiry of the period given in its letter to the defendants dated 23 December 2010 informing that the patient was medically fit to be discharged from the hospital.

**[9]** Except for the deposit of RM20,000, the medical bills for the period of 31 July 2011–31 January 2012 for the amount of RM218,606.10, the period of 31 January 2012–26 February 2013 for the amount of RM537,477, and the period of 29 February 2013–30 September 2014 in the sum of RM873,553.65 were not paid by the defendants. As the medical charges are continuing on a daily basis, the total amount claimed by the hospital for the period from 31 July 2011–31 March 2015 is RM1,900,013.85.

The defendants' counterclaim for negligence

**[10]** It is an undisputed fact that the patient's parents had come to know of Dr Cheok through a newspaper article.

A **[11]** On 2 May 2008, the patient's father brought his 12 years old daughter, ie the patient or the third plaintiff in the counterclaim, to the hospital for consultation with Dr Cheok for the patient's spinal deformity.

B **[12]** Dr Cheok conducted physical examination on the patient and found the presence of a higher left shoulder with a stiff right thoracic hump and a plump line 2cm off centre. There was no neurological deficit. The X-ray of the patient revealed that the patient had a double thoracic curve with cobb's angle: T1 – T5 = 62° and T6 – T12 = 100°. Dr Cheok concluded that the patient had idiopathic scoliosis. Dr Cheok then informed the patient's father about the surgery that the patient would require.

C

**[13]** On 2 June 2008, the patient was admitted into the hospital. The operation was scheduled on 3 June 2008. Dr Cheok then obtained the approval from the hospital for Dr Wong, from the Kuching General Hospital, to assist him to perform the surgery on the patient.

D

**[14]** On the same day, 2 June 2008, the patient's father signed a consent form for the said surgery.

E

**[15]** On 3 June 2008, the surgery was carried out by Dr Cheok and Dr Wong, with Dr Patrick as the anaesthetist. The surgery took about seven hours from 9am–4pm.

F

**[16]** The surgery was performed with the patient in a prone position and hypotensive anaesthesia was administered with a view to reduce intra-operative bleeding (see opinion of Dr KS Dhillon ('Dr Kuldip') in AR Vol 2(9) Pt C pp 2885–2886 in Appeal No 1401).

G

**[17]** After the surgery, whilst the patient was still in the intensive care unit ('ICU'), Dr Cheok instructed the patient to move her legs, which the patient was able to do.

H **[18]** On 4 June 2008 at 11.15am, Dr Cheok noted in the nursing report 'T/O to paed's ward' which indicates his instruction to transfer the patient out of the ICU to the paediatric general ward ('general ward'). This was confirmed by Dr Cheok in his evidence. The patient was then transferred to the general ward.

I

**[19]** At the general ward, on the same day, when the patient was awake, the patient's parents spoke to her. The patient became drowsy and the patient's mother tried to wake her up but there was no response from her. The patient's father then called the nurse who came. The nurse told the patient's parents not

to worry as it was only due to the pain relief medication given to the patient and the patient needed a lot of rest. The nurse then left the room.

**[20]** On the same day, at about 2.50pm the ward nurse informed Dr Cheok that the patient had collapsed in the general ward. When Dr Cheok arrived at the general ward, he was informed by the staff nurse that the ward nurses had carried out active resuscitation by way of cardiac massage, ambu-bagging and cardio-pulmonary resuscitation ('CPR') and that the patient had regained her heartbeat and respiration.

**[21]** The patient was transferred back to the ICU for further observation and put on a ventilator.

**[22]** On 5 June 2008, the neurological assessment of the patient showed no movement of the patient's upper and lower limbs. Dr Cheok discussed the matter with Dr Khaw Poh Guan, the consultant paediatrician, Dr Samuel Easaw, the consultant neurologist at the hospital, and two other spinal surgeons. It was the consensus of the doctors that the implants be removed from the patient to exclude any possible cause of the neurogical deficit.

**[23]** Thereafter, the patient's father was informed by Dr Cheok of the decision and rationale to remove the implants and a written consent was obtained from the patient's father. On the same day, 5 June 2008, at 4pm, Dr Cheok removed all the implants from the patient.

**[24]** After the implants were removed, there was no neurogical improvement of the patient's condition.

**[25]** The X-rays and MRIs done on the patient, after the removal of the implants, show as follows:

(a) MRI of the brain on 11 June 2008 shows 'diffuse acute infarction of the spinal cord/medulla with haemorrhagic transformation';

(b) MRI of the cervical spine on 11 June 2008 shows 'extensive acute infarction of lower medulla and cervical spinal cord with haemorrhagic transformation in the central cord'; and

(c) MRI of the thoracic spine on 17 June 2008 shows 'extensive cord oedema and infarction'.

**[26]** The patient is quadriplegic. She is paralysed from the neck down and dependent on a ventilator for breathing.

A DECISION OF THE HIGH COURT

**[27]** In his grounds of judgment ('judgment') dated 14 July 2015, the learned judicial commissioner ('JC'), Nordin bin Hassan, at pp 61–62 (AR Vol 1/2 Pt A pp 80–81 in Appeal No 1384) made the following orders:

B

> [202] The plaintiff's claim in the original action for the outstanding medical bills is allowed.
>
> [203] The defendants in the original action is to pay the plaintiff in the amount of RM2,350,013.85.
>
> C [204] I also order the defendants in the original action to pay cost to the plaintiff in the sum of RM20,000.
>
> [205] The interest shall be at the rate of 5% per annum on the judgment sum until full realisation.
>
> D [206] In the counterclaim the defendants who become the plaintiffs, claim for damages for medical negligence. The plaintiffs claim is allowed.
>
> [207] The defendants in the counter claim is to pay the plaintiffs general damages of RM6,023,802.
>
> [208] The interest for the general damages of RM6,023,802 shall be at the rate 8% E per annum from date of filing the suit until date of judgment.
>
> [209] There shall also be an interest at the rate of 5% per annum on the judgment sum until full realisation.
>
> [210] I also order the defendants in this counter claim to pay cost to the plaintiff in the sum of RM60,000. F

THE FOUR APPEALS

*Appeal No 1384*

G

**[28]** This appeal is by the patient and her parents against the High Court decision on the counterclaim as follows:

1. that the claim for past and future hospital expenses incurred be disallowed;
2. H that the applicable multiplier for calculating certain items of future loss and damage be 21.4 years;
3. that damages for the cost of nursing care be awarded in the sum of RM10,000 a month;
4. I that no award of damages be made for the Goods and Services Tax ('GST') which would be incurred on various items of future loss and damage, and
5. that costs be awarded to be third appellant in the sum of RM60,000.

(Note: in sub-para 5 above, the 'third appellant' refers to the patient).

*Appeal No 1385*

**[29]** This appeal is by the three doctors, namely Dr Cheok, Dr Patrick and Dr Wong in respect of part of the High Court decision which allowed the counterclaim of the patient for negligence against the three doctors and which ordered general damages of RM6,037,600, interests and costs of RM60,000 against them.

*Appeal No 1401*

**[30]** This appeal is by the hospital against part of the decision of the High Court which allowed the counterclaim of the patient and her parents and awarded general damages together with interests and costs against the hospital.

Cross-appeal

In Appeal No 1401, the patient and her parents filed a cross-appeal to vary the High Court order dated 14 July 2015 as follows:

1. bahawa tuntutan Responden Ke-3 untuk perbelanjaan hospital yang lepas dan masa depan dibenarkan;
2. bahawa pengganda ('multiplier') yang terpakai untuk mengira item-item masa depan yang tertentu bagi kerugian dan kerosakan masa depan dinaikkan kepada 56.6 tahun atau jangka hayat lain yang munasabah;
3. bahawa ganti rugi untuk kos penjagaan kejururawatan diawadkan dalam jumlah RM50,000 sebulan;
4. bahawa suatu awad ganti rugi dibuat bagi Cukai Barangan dan Perkhidmatan ('GST') yang akan ditanggung untuk pelbagai item kerugian dan kerosakan masa depan; dan
5. bahawa kos diawadkan kepada Responden Ke-3 dalam jumlah yang melebihi RM60,000 dan juga perbelanjaan hangus dalam jumlah RM101,817.65 dibenarkan.

(Note: 'responden ke-3' or the third respondent in the above refers to the patient).

*Appeal No 290*

**[31]** Subsequent to the High Court decision, the hospital filed a notice of application ('the application') to amend and/or vary the sealed order of the High Court dated 14 July 2015 ('sealed order') in para 4 thereof which reads as follows:

A 4. Tuntutan Plaintif Ke-3 dalam tuntutan balas dalam kedua-dua guaman no 85 dan 307 dalam jumlah RM6,037,600 dibenarkan dengan faedah ke atasnya pada kadar 8% setahun daripada tarikh pemfailan hingga tarikh penghakiman.

B **[32]** The hospital submits that the sealed order which allowed the counterclaim of the third plaintiff (ie the patient) is incorrect since it does not reflect the judgment of the High Court which had given judgment on the counterclaim in favour of all the respondents in this appeal (ie the first, second and third plaintiffs in the counterclaim, namely the patient and her parents).

C **[33]** The learned JC, Abdul Wahab bin Mohamad, heard the application and dismissed it with costs on 15 January 2016. The hospital then filed Appeal No 290 against the whole of the said decision of the High Court dated 15 January 2016.

D OUR DECISION

**[34]** Having heard the submissions of respective learned counsels, and having perused the records of appeal, on 27 April 2018 we delivered our E unanimous decision and made the following orders.

*Appeal No 1384: Regarding the main claim of the hospital, and the counterclaim of the patient and her parents, for the refund of the deposit for surgery*

F **[35]** The appeal of the patient and her parents regarding the main claim of the hospital for hospital bills, and the counterclaim of the patient and her parents for a refund of the deposit of RM20,000 paid to the hospital, is dismissed with costs to the hospital. The decision and order of the High Court is affirmed.

G *Appeal No 1385: Regarding the counterclaim*

**[36]** The appeal of Dr Check and Dr Wong regarding liability for negligence is dismissed with costs to the patient. The decision and order of the High Court H regarding these two doctors is affirmed except that we now vary that order and apportion the liability of Dr Cheok to be 65% and the liability of Dr Wong to be 35%.

I **[37]** The appeal of these two doctors regarding quantum of damages is dismissed except for the multiplier of 21.4 years which appeal is now allowed and substituted with the multiplier of 13 years for the various items awarded, wherever applicable.

**[38]** The appeal on liability for negligence of Dr Patrick is allowed with costs to him. The decision and order of the High Court on liability regarding Dr Patrick is set aside.

**[39]** In the event that this decision on liability is later reversed by the Federal Court, then the appeal of Dr Patrick regarding quantum of damages is dismissed except for the multiplier of 21.4 years which is to be allowed and substituted with the multiplier of 13 years for the various items awarded, wherever applicable.

*Appeal No 1401: Regarding the counterclaim*

**[40]** The appeal of the hospital regarding liability for negligence is allowed with costs to the hospital. The decision and order of the High Court on liability is set aside.

**[41]** In the event that this decision on liability of the hospital is later reversed by the Federal Court, then the appeal of the hospital regarding quantum of damages is dismissed. In such a case, the decision of this court regarding the quantum of damages allowed against Dr Cheok and Dr Wong shall also apply to the hospital.

Cross-appeal

**[42]** The cross-appeal of the patient and her parents in Appeal No 1401 regarding quantum of damages is dismissed with costs to the hospital.

*Appeal No 290*

**[43]** The appeal of the hospital is dismissed with costs to the patient and her parents. The decision and order of the High Court is affirmed. However, the sum for general damages in the counterclaim in the same order is to be amended accordingly from RM6,037,600 to a sum which has taken into account the new multiplier of 13, instead of the old multiplier of 21.4, for the total damages awarded.

**[44]** We would deal with the issue regarding costs, and other consequential orders in the later part of this judgment.

GROUNDS OF DECISION

*Appeal No 1384: Regarding the main claim of the hospital, and the counterclaim by the patient and her parents for refund of the deposit for surgery*

**[45]** We find no merits in the appeal. The learned JC had rightly held that the hospital had established its claim in the two consolidated civil suits ie Civil Suit Nos 22NCVC-85–02 of 2013 and 22NCVC-307–10 of 2013 for the medical bills of RM2,350,013.85 and allowed the same. The hospital's claim was not disputed by the patient and her parents. In fact, as stated by the learned JC in his judgment, learned counsel for the patient and her parents had agreed in his oral submissions, and as stated in para 177 of his written submissions, that the claim is to be allowed. Accordingly, the appeal of the patient and her parents is dismissed with costs to the hospital. The decision and order of the High Court is affirmed.

*Appeal Nos 1384, 1385 and 1401: Regarding the counterclaim*

Issue on liability

Regarding the hospital vicarious liability

**[46]** The learned JC held that the hospital was vicariously liable for breach of duty of care to the patient based on the following clauses of the agreement of the doctor with the hospital:

(i) clause 5.4 — the doctor is automatically become member of the Medical and Dental Staff of the Hospital and subject to the by laws of the Medical and Dental Staff.

(ii) clause 5.5 — the doctor only provide his services during office hours of working days of the Hospital.

(iii) clause 5.6 — the doctor to devote all his time, attention and abilities to the business of the Hospital.

(iv) clause 5.10 — the doctor to provide 24 hours coverage for all patients admitted to the Hospital under his care and service and the doctor must be one who his (sic) credential and approved by the hospital.

(v) clause 5.11 — the doctor must insure (sic) the patients medical record must be completed within 5 working days from the date of discharge of the patients and failing which the Hospital have the right to withhold payment of the medical fees.

**[47]** As for Dr Patrick, the learned JC stated that he was involved in the surgery on the 4 June 2008 only upon the approval of the hospital, and the hospital's executive committee had agreed to give him a fee of RM5,000.

**[48]** Having analysed all the facts, the learned JC concluded that the hospital had some control over the doctors in the performance of their duty in the hospital. In totality, he found that the doctors were in fact the agents of the

hospital in providing the healthcare to the patient. Therefore, the learned JC held that the hospital was vicariously liable for the negligent acts of the doctors.

**[49]** In considering these appeals, we are guided by the recent Federal Court decision in *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 10 CLJ 529 ('*Sunway* case'). In that case, the Federal Court considered the two-stage test in *Various Claimants v Catholic Child Welfare Society and others* [2013] 2 AC 1 which the Supreme Court laid down for imposing vicarious liability for the tortious acts of abuse by the brothers in the religious institute:

(1) Whether the relationship between 01 and 02 is sufficiently akin to that of employer and employee; and

(2) Whether there is a sufficiently close connection between the D1–D2 relationship and D1's tortious act.

**[50]** In the *Sunway* case, in deciding the fourth question, namely:

> Whether private hospitals in Malaysia such as the appellant hospital can or should be held vicariously liable for the tortious conduct or clinical negligence of medical doctors vis a vis their patients while practising at such private hospitals as independent contractors?

The Federal Court at p 41 stated:

> The test for vicarious liability in *Various Claimants* requires the court to determine the nature of the relationship between the hospital and the medical practitioner, and the connection between that relationship and the wrongful act by the practitioner. The determination is a question of fact, based on a consideration of multiple factors and calls for an evaluative judgment. The terms regulating the general relationship between a hospital and a practitioner, and the particular terms applicable in the circumstances of the alleged negligence, may vary from case to case. As such, the vicarious liability of the private hospitals for the torts of medical practitioners cannot be determined with a broad brush in a factual vacuum.

**[51]** From a perusal of contract entered into by the hospital with Dr Cheok and Dr Patrick respectively, it is clear that the contract was one for services, and both doctors are independent contractors, and not agents or employees of the hospital. As submitted by the hospital, both doctors operated independent businesses free from the control, interference, and/or obstruction by the hospital management. We note that in fact both Dr Cheok and Dr Patrick have specifically pleaded that they were independent contractors. Therefore, the learned JC had erred in holding that the hospital was vicariously liable for the alleged negligence of these two doctors.

**[52]** As for Dr Wong, it is clear from the evidence adduced that Dr Wong was brought in by Dr Cheok to perform the operation on the patient at the hospital with the approval given by the hospital. However, Dr Wong was not an employee of the hospital. Thus, the hospital was also not vicariously liable for the alleged negligence of Dr Wong.

**[53]** There is no evidence that Dr Cheok and Dr Wong had requested the hospital to supply spinal cord monitoring ('SCM') facilities for the patient's spinal surgery. Thus, the hospital cannot be made liable on that issue.

Issue on non-delegable duty of care

We observe that the learned JC adopted the doctrine of non-delegable duty as explained in *Cassidy v Ministry of Health* [1951] 2 KB 343 where Lord Denning, inter alia, stated:

> I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, *he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract for services* ... the hospital authorities accepted the plaintiff as a patient for treatment, and it was their duty to treat him with reasonable care. They selected, employed, and paid all the surgeons and nurses who looked after him. He has no say in their selection at all. If those surgeons and nurses did not treat him with proper care and skill, then the hospital authorities must answer for it, for it means that they themselves did not perform their duty to him. I decline to enter into question whether any of the surgeons were employed only under a contract for services, as distinct from contract of service. The evidence is meagre enough in all conscience in that point. But the liability of the hospital authorities should not and does not, depend on nice considerations of that sort. *The plaintiff knew nothing of the terms on which they employed their staff*, all he knew was, that he was treated in the hospital by people whom the hospital authorities appointed and *the hospital authorities must be answerable for the way in which he was treated*. (Emphasis added.)

With respect, we find that without much analysis, the learned JC had applied the doctrine of non-delegable duty of care to the hospital and held in para 147 of his judgment that the hospital was liable under the said doctrine:

> This doctrine will certainly put (sic) hospital authority on alert to ensure excellent healthcare to patients and provide all the required safety protocols to be followed strictly by their staffs or their independent contractors and this certainly will help to avoid or minimise their negligent act. In a way this doctrine will help to improve the organisational (sic) and the system of a hospital.

**[54]** Regarding the said doctrine, here again we are guided by the decision in the *Sunway* case where at pp 29–30 the Federal Court stated:

Non-delegable duties are based on an assumption of responsibility, inferred from the circumstances of the relationship between the plaintiff and the defendant. It is not imposed based on relative resources or vested interest, nor does it depend on the terms of the relationship between the defendant and the person to whom the duty is delegated. The personal choice of a patient is not an independent test in itself but a relevant factor in applying the *Woodland* analysis, in particular in determining whether there is an antecedent patient-hospital relationship from which to impute as assumption of responsibility by the hospital towards the patient.

The facts in this case point against the existence of such an antecedent relationship. From the circumstances surrounding the plaintiff's engagement of Dr Kok and admission to the hospital, it can be inferred that the plaintiff reasonably expected the operation to be conducted by Dr Kok with due care, wherever Dr Kok referred him to do so; the hospital would merely provide the relevant facilities required for his admission and operation. In respect of the conduct of the operation by Dr Kok, we do not find that the hospital has assumed a positive duty to protect the plaintiff from injury.

This scenario can be contrasted with a hypothetical situation where a patient enters a hospital and relies upon the latter's internal system to be referred to any suitable doctor on duty. In that situation, the hospital having accepted the patient and undertaken to treat him may well be under a non-delegable duty to ensure that he is treated with due care, by whomever the hospital engages to do so.

**[55]** Applying the above principle to the present case, we agree with the submissions of the hospital that, on the facts, the hospital did not have an antecedent relationship with the patient. It is clear from the evidence adduced that the patient's parents had sought the services of Dr Cheok after reading about Dr Cheok in the newspaper. The hospital did not, through its own internal system, select Dr Cheok and Dr Wong to perform the surgery on the patient. In the absence of an antecedent relationship with the patient, the hospital cannot be held liable under the non-delegable duty of care.

**[56]** More importantly, we note that the issue of non-delegable duty of care was not even pleaded by the patient and her parents in the first place. Therefore, the issue ought not to have been considered by the learned JC when it was raised at the late stage of the submissions. We do not agree with the submissions of learned counsel for the patient and her parents who, in relying on the Federal Court decision in *Tun Hussein Onn National Eye Hospital v Megat Noor Ishak bin Megat Ibrahim & 2 Others* Civil Appeal No 01(f)–26–04 of 2015(W) (unreported) (FC), submits that even if 'the plaintiff had not pleaded direct liability on the hospital's part for negligence ... the essence of a non-delegable duty have been pleaded'.

**[57]** With respect, we are of the opinion that a claim made under the doctrine of non-delegable duty of care must be expressly pleaded against the hospital. Otherwise from a plain reading of the counterclaim of the patient and

her parents, it is clear that their claim against the hospital is based on vicarious liability, but not on the cause of action of non-delegable duty of care.

Regarding the three doctors

Pre-operation stage

**[58]** At the time when the patient first saw Dr Cheok on 2 May 2008, Dr Cheok noted in his record, inter alia, that the patient's deformity was noted a year ago, and the patient was able to participate in school activity. However, Dr Cheok advised for surgery.

**[59]** According to Dr Kuldip, the patient's plumb line is only 2cm off centre, that means a very slight tilt. It is not even a cosmetic problem, so Dr Kuldip questioned the need for spinal surgery to correct the deformity. With the patient's double curve and range, he would not even recommend surgery.

**[60]** Dr Cheok in his evidence admitted that it is important to observe the patient over a period of time to see the progression of the scoliosis. Dr Cheok admitted that he did not inform the patient's father of the inherent and material risks of quadriplegia that may arise from the surgery to be undertaken by him and Dr Wong. This is also evident from the consent form dated 2 June 2008 produced in court which only stated a 1–2% risk of paraplegia (ACB Vol 3 for Appeal No 1385 p 476 bottom). As such, the learned JC had rightly held that there was a breach of duty of care and negligence on the part of Dr Cheok for failing to obtain an informed consent from the patient's father (see also Federal Court decision in *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593; [2007] 1 CLJ 229).

**[61]** We agree with the learned JC that based on Dr Cheok's initial examination, and Dr Kuldip's evidence, Dr Cheok had breached his duty of care to the patient at the pre-operation stage when he advised the patient's parents to go ahead with surgery on the patient. The patient could have been observed over a period of time since the patient's deformity was not even a cosmetic one, and the patient was able to participate in school activity.

**[62]** However, we are of the opinion that Dr Wong should not be made liable because he was not present and was not involved at the pre-operation stage when the consent of the patient's father was obtained and the consent form was signed by the patient's father.

**[63]** Further to the above, we are of the opinion that the learned JC is right to hold that Dr Cheok had breached his duty of care by not requesting for and referring to the medical records or clinical information of the patient from her

previous hospital, namely the Penang General Hospital, during the pre-operation stage. However, we do not think that Dr Wong ought to be made liable, together with Dr Cheok, during the pre-operation stage.

**[64]** As for Dr Patrick, there is evidence that he had obtained an informed consent before administering anaesthesia to the patient for surgery. As such, he cannot be held liable for negligence at the pre-operation stage.

During the operation stage

**[65]** In our view, the learned JC had rightly relied on the medical expert opinion of Dr Kuldip ('PW2'), Dr Sylvian Dass, and Prof Chan Yoo Kuen ('Prof Chan') ('DW3') to arrive at his findings that Dr Cheok and Dr Wong had breached their duty of care during the operation stage.

**[66]** During the surgery, the patient was put in a prone position. Dr Kuldip, Dr Slyvian Dass and Prof Chan were of the view that the prone position and the administering of anaesthesia are a common practice in spinal surgery so long as the doctors have taken all the necessary precautions to ensure the patient's safety.

**[67]** However, Dr Kuldip gave evidence in detail about the risk of positioning the patient in a prone position and the administration of anaesthesia where the patient suffers hypotension and there are no SCM facilities to assist the doctors during the surgery.

**[68]** Based on the evidence of Dr Kuldip, Dr Slyvian Dass, and Prof Chan, we are of the considered opinion that the learned JC is correct in holding that both Dr Cheok and Dr Wong were negligent in undertaking the surgery on the patient without requesting the hospital to supply the SCM facilities for their use during the surgery. However, in our view the hospital cannot be made liable for failure to provide such facilities when, in the first place, Dr Cheok and Dr Wong did not request the Hospital to make the facilities available for their use during surgery. The X-rays and MRI done on the patient show clearly that the patient's condition was due to the negligence of these two doctors in the exercise of their professional skills during the course of the surgery performed by them, and this has nothing to do with the hospital. Therefore, the learned JC had erred to hold that the hospital is liable for not providing those SCM facilities, and for organisational and system failure.

**[69]** As for Dr Patrick, there is no evidence to prove that he was negligent during the surgery performed on the patient by Dr Cheok and Dr Wong. We have scrutinised the written judgment and we do not find any basis to support the learned JC's finding that Dr Patrick was negligent in the administration of

A the anaesthesia during the course of the operation, notwithstanding the high risk involved when the patient was put in a prone position during the surgery and subjected to 'hypertensive anaesthesia' (note: the learned JC had used the term 'hypertensive anaesthesia' in his judgment which we respectfully think is incorrect. The correct term should be 'hypotensive anaesthesia' (see the B opinion of Dr Kuldip in AR Vol 2(9) Pt C pp 2885–2886 in Appeal No 1401)).

**[70]** In our view, it would be wrong to conclude that because of the patient being put in the prone position for administration of anaesthesia, the patient is now a quadriplegic. We think it appropriate to apply the 'but for' test here. But C for the spinal cord surgery being performed on the patient by Dr Cheok and Dr Wong without the use of the SCM facilities, we do not think that the mere act of putting the patient in the prone position and administering the hypotensive anaesthesia would by itself cause the quadriplegia. Therefore, we D are satisfied that Dr Patrick cannot be held liable for negligence during the operation stage.

**[71]** Finally, it all boils down to the actual surgery being conducted, whether there is negligence on the part of Dr Check and Dr Wong.

E

**[72]** Dr Kuldip explained that the cause of quadriplegia was not due to cord distraction at the time of the correction of the deformity, but due to ischaemia of the cord due to a vascular event. Therefore, the spinal cord monitoring during the operation is very important. Dr Kuldip stated that the doctors F should not be doing scoliosis surgery without the SCM facilities. Dr Kuldip's evidence was supported by another expert witness, Dr Sylvian Dass.

**[73]** Prof Chan ('DW3') was the doctors' expert witness. She also acknowledged the importance of having SCM facilities during spinal surgery. G We now reproduce her answer in court which was considered by the learned JC:

> In this particular surgery, what they are actually trying to do is to straighten out the spine that has gone, in layman's term crooked. So they would like to straighten it. H But in straightening it, they can actually stretch the bones and ultimately the cord. So the function of the cord is to allow the nerves transmission from the lower limbs back to the brain and also for transmission of further impulse from the brain downwards. So, when the surgeons operate and they distract the cord that means they have actually stretched too far, the function of the cord will be compromised. I So this monitoring is to actually help us determine whether there has been a compromise at all in this cord. And if there is a compromise then the surgeon should use this monitor to tell him to reduce the distraction, that means, instead of pulling that long, to reduce the distraction so that the injury would not be there or would be minimal.

**[74]** According to Prof Chan, SCM facilities are not new to the medical world as they were introduced as early as in the 1970s. Her working place at University Malaya Medical Centre also has the SCM facilities.

**[75]** Both Dr Cheok and Dr Wong relied on the basic wake-up test which was carried out once in the said surgery. However, as stated by the learned JC, this is not an efficient method to monitor the spinal cord continuously during the surgery. Thus, even though the wake-up test was used, and after surgery while at the ICU, the patient could move her leg, the fact remains that the end result is that the patient is quadriplegic. If the spinal surgery had not been undertaken by Dr Cheok and Dr Wong on that day, the patient would not be a quadriplegic and dependent on the ventilator today.

**[76]** We therefore agree with the learned JC that Dr Cheok and Dr Wong had breached their duty of care to the patient in performing the spinal surgery without the SCM facilities.

**[77]** The hospital cannot be made liable for failure to provide such SCM facilities when, in the first place, Dr Cheok and Dr Wong did not request the hospital to make these facilities available for their use during surgery. In our opinion, the learned JC had erred to hold that the hospital was liable for not providing those facilities, and for organisational and system failure.

Post operation stage

**[78]** We agree with the submissions of learned counsel for the three doctors that there was no specific pleading by the patient and her parents on the three doctors' negligence after the surgery in regard to the premature transfer of the patient from the ICU to the general ward. What was pleaded in the defence and amended counterclaim of the patient and her parents, in particular paras 11–28 to 11–30, was only in respect of system failure ie the doctors' failure to have a proper, effective, safe and reliable system for the treatment of the Patient and to prevent causing injury to the patient (see also para 132 of the judgment in AR Vol 1/2 Pt A p 52). In our opinion, this pleading is insufficient to cover the doctors' negligence at the post operation stage. The patient and her parents are bound by their pleadings and thus they can only claim for the purported negligence of the three doctors before and during the surgery, but not after that. As such, Dr Cheok, Dr Patrick and Dr Wong cannot be held liable for negligence after the surgery ie for the alleged premature discharge and transfer of the patient from the ICU to the general ward.

**[79]** In view of this, it logically follows that there was no causal link or causation proved by the patient and her parents against the hospital. The hospital cannot be made liable for the decision of Dr Cheok to direct the nurses

to discharge and transfer the patient from the ICU to the paediatric general ward. In any case, as submitted by learned counsel for the hospital, the pleadings of the patient and her parents only pleaded causation against the three doctors, but not against the hospital. It was not pleaded that the hospital caused the quadriplegia of the patient. The hospital did not perform the surgery on the patient and therefore cannot be held liable for the quadriplegia that resulted from the surgery. None of the alleged acts or omissions of the hospital nurses, whether in the ICU or at the general ward, would per se or intrinsically by itself cause the quadriplegia of the patient.

Regarding the issue of quantum of damages

**[80]** We do not find any appealable errors regarding the award made by the learned JC on general damages, general damages for future care, and special damages and pre-trial losses for the items of travel expenses, and future care and expenses.

**[81]** In our opinion, the learned JC rightly held that in the absence of any evidence adduced in court from any expert witness of the hospital and the three doctors, the unrebutted evidence of the patient's consultant physiotherapist, Dato' Dr Balwant Singh Bains ('PW5'), and rehabilitation physician, Dr Mohd lzmi ('PW6'), ought to be accepted.

**[82]** However, for the item on 'life expectancy', we deem it fit to vary the multiplier of 21.4 years used by the learned JC based on the NSCISC database and based on a life expectancy of 48.6 years (12 (age of patient at injury + 36.6 (High Tetra (C1–C4)) = 48.6 years) (on the basis that the patient is not ventilator dependent) to a multiplier of 13 years based on a life expectancy of 37.3 years (ie life expectancy of 37.3 – age at trial of 18 years – 1/3 contingencies = 12.86 (rounded up to 13 years)) for the patient who is still ventilator dependent. We note that in fact the learned JC had also considered a life expectancy of 36.9 years if the patient is ventilator dependent ie 12 (age of patient at injury) + 24.9 (ventilator dependent) = 36.9 years (see para 175 of his judgment at AR Vol 1/2 Pt A p 67). According to our calculation, that would give a multiplier of 12.6 years (ie life expectancy of 36.9 – age at trial of 18 years – 1/3 contingencies = 12.6 years (rounded – up to 13 years)). We further considered the latest report of Dr Theva Raj a/l Ponnudurai ('Dr Theva'), Head of the Rehabilitation Medicine Department of the Tuanku Ja'afar Hospital, Seremban, who was appointed by this court by an order dated 17 October 2017 pursuant to the notice of motion in encl 25(a) filed by the appellant's counsel in Appeal No 1401 (see Dr Theva's expert report dated 21 November 2017, supplementary record of Appeal No 2 at pp 38–39), and

the submissions of respective learned counsels for the hospital, the three doctors, and the patient and her parents on the appropriate multiplier to be used.

**[83]** Dr Theva had stated that at the time of his report (at that time the patient was still not weaned off the ventilator), the patient was 21 years of age, and her further life expectancy referencing this would be another 21.74 years. However, due to potential additional complications, the care level at home in future, and her high risk of repeated infections that could make her life expectancy to be as short as six months to two years. It could possibly be as long as 22 years if her pressure sores were healed before her discharge.

**[84]** The hospital submits that the multiplier ought to be from as low as 3.5 years based on a life expectancy of 23 years (ie 23–18–1/3 = 3.33 (rounded up to 3.5 years)) to a multiplier of 13 years based on a life expectancy of 37.3 years (ie 37.3–18–1/3 = 12.86 (rounded up to 13 years)).

**[85]** The three doctors submit that at the very least the multiplier should be reduced from 21.4–13 years.

**[86]** The patient and her parents submit a life expectancy of 56.6 years and a multiplier of 27.02 years (ie 56.6–18–30% = 27.02 years). However, in their table on quantum ie Tables 1 and 2, they have stated a multiplier of 18 years. We note, however, that there is no submission on how they derived at the multiplier of 18 years. In our opinion, the appropriate multiplier ought to be 13 years as stated by the learned JC in his judgment if the patient is ventilator dependent, which the patient currently is, and as submitted by the hospital and the three doctors.

**[87]** Further, the awards by the learned JC on the items under disabled friendly home, cost of disabled friendly motor vehicle, costs of machines and appliances and equipment are not plainly wrong and are therefore upheld by us except that, wherever applicable, the multiplier of 21.4 years is to be now substituted with the multiplier of 13 years.

**[88]** Regarding the item on cost for home nursing care, we agree with the submissions of learned counsel for the three doctors that the learned JC did not give any reason or basis on why he awarded the sum of RM10,000 per month for nursing care. There was no mention of specific evidence to support the amount awarded. We further note that there is no evidence to support the appeal of the patient and her parents to increase the cost of nursing care from RM10,000–RM50,000 per month as stated in their cross appeal. We are of the opinion that there is no justification for the patient and her parents to claim RM50,000 a month based on their submissions that the hospital was charging

about RM50,000 per month. We consider the fact that the award here is one for home nursing care, and not for institutional/hospital nursing care. We also note the initial submissions of the three doctors that a possible award would, at the most, be between RM20,000–RM25,000 per month.

**[89]** We also considered the decision in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1 where the sum of RM800 per month for one maid was awarded by the trial judge and affirmed by the Federal Court. Nevertheless, in the present case, we do not think that we should disturb the award of RM10,000 given by the learned High Court judge for home nursing care. To our minds, this sum is reasonable since the patient, being ventilator dependent, would require not just one maid to take care of her basic needs, but requires proper nursing care and management.

**[90]** Regarding cost of care, for physiotherapy and massage therapy, and regarding cost of future medical treatment/consultations, and cost of personal and hygiene needs, the awards given by the learned JC are upheld except that the multiplier of 21.4 years, wherever applicable, is now substituted with the multiplier of 13 years.

**[91]** Regarding the award for the total sum of RM6,023,802 for general damages for pain and suffering and loss of amenities of life, we are of the opinion that the sum of RM6,023,802 ought to be varied according to the new multiplier of 13 years being factored into any of the foregoing applicable items stated in para 201 of the judgment of the High Court (AR Vol 1/2 Pt A p 79).

**[92]** We do not think that the learned JC was plainly wrong in his exercise of discretion not to allow the patient an award on damages for goods and services tax ('GST'), which would be incurred in the future, on various items of future loss and damage. As such, we do not think that there should be appellate intervention regarding this item.

*Appeal No 290*

**[93]** Learned counsel for the hospital submitted that para 4 of the sealed order of the High Court dated 14 July 2015 (the appellant's CB — judgments — for Appeal No 1401, pp 40–43 at p 42) contains the error of referring only to the third plaintiff, ie the patient, in her counterclaim against the hospital and the three doctors. This is inconsistent with, and does not reflect, the decision of the learned JC in his judgment dated 14 July 2015 which in para 207 clearly refers to 'the plaintiffs' (the appellant's CB Vol 1 (Revised) Tab 1 at p 61).

**[94]** Learned counsel for the hospital submitted further that this was also borne out by the fact that the patient and her parents had pleaded in their amended counterclaim re-dated 27 March 2015, the following at para 16:

> Oleh yang demikian Plaintif Pertama, Kedua dan Ketiga menuntut dari Defendan-defendan:
>
> 1. Gantirugi am;
> 2. Gantirugi khas;
> 3. Kos;
> 4. Faedah;
> 5. Lain-lain relif.

(Note: 'Plaintif Pertama, Kedua dan Ketiga' above refer to the patient and her parents).

**[95]** Learned counsel for the hospital also pointed out that the learned JC had expressly stated in his judgment at para 206 that:

> In the counterclaim, the defendants who become the plaintiffs, claim for damages for medical negligence. The plaintiffs claim is allowed.

**[96]** The learned JC, Abdul Wahab bin Mohamad, held that 'there is no discrepancy as claimed by the hospital'. As such, he dismissed the hospital's application and did not correct the alleged errors and discrepancies between the judgment of the learned JC, Nordin bin Hassan, and the sealed order of the High Court dated 14 July 2015, as contended by the hospital.

**[97]** Upon a thorough perusal of the sealed order of the court and the judgment of the learned JC, we find no merits in this appeal by the hospital. We are of the opinion that para 4 of the sealed order of the High Court dated 14 July 2015 (appellant's CB — judgments — for Appeal No 1401, pp 40–43 at p 42) is correct when it refers only to the third plaintiff, ie the patient, for the purpose of the counterclaim in regard to general damages, and general damages for future care. This is consistent with and is supported by the second para 4 at p 5 of the same order which states, 'tuntutan plaintif Ke-3 dalam tuntutan balas dalam kedua-dua guaman no 85 dan 307 dalam jumlah RM6,037,600 dibenarkan'. It must be noted that the hospital filed the original action for outstanding medical bills against only the patient's parents (see statement of claim ('SOC'), and amended SOC). The patient was only brought in as a party and was involved when the defendants filed their defence and made a counterclaim against the hospital and the three doctors for negligence. Thus, it should be understood that the learned JC had intended that the patient be the only person entitled to be awarded the general damages, and not the patient's parents. To hold otherwise would lead to absurdity. Notwithstanding the fact

that in para 207 of the judgment of the High Court dated 14 July 2015 (AR Vol 1/2 Pt A p 80) it is stated that 'the defendants in the counter claim is (sic) to pay the plaintiffs general damages of RM6,023,802', it is our view that general damages are to be paid only to the patient, as the third plaintiff in the counterclaim, and not to the patient's parents who did not undergo spinal surgery and suffer such damages.

**[98]** We further note that the sealed order of the High Court refers to general damages in the sum of RM6,037,600 which is erroneous since the judgment of the High Court in para 208 (AR Vol 1/2 Pt A p 80) expressly states that the total judgment sum is RM6,023.802. In our opinion, the error has to be corrected. However, in the light of our decision, and taking into account the new multiplier of 13 years, this sum has to be further amended accordingly.

*Orders of this court*

**[99]** Based on our unanimous decision, we made the orders of this court on the four appeals as stated earlier in paras 34–43 of this judgment.

COSTS

**[100]** We considered the submissions of learned counsels of all parties on 27 April 2018 regarding costs for the four appeals, and we made the following unanimous decision and orders:

*Appeal No 1384*

**[101]** The patient and her parents are to pay the hospital costs of RM30,000, subject to payment of the allocator fee.

*Appeal No 1385*

**[102]** Dr Cheok and Dr Wong together are to pay the patient and her parents costs of RM30,000, subject to payment of the allocator fee.

**[103]** The patient and her parents are to pay Dr Patrick costs of RM30,000, subject to payment of the allocator fee.

*Appeal No 1401 and the cross appeal*

**[104]** The patient and her parents are to pay the hospital costs of RM60,000 here and below, subject to payment of the allocator fee.

**[105]** We recorded by consent of the parties that the patient's parents undertake to procure the discharge of the patient from the hospital within three months from the date of payment of the judgment sum by Dr Cheok and Dr Wong.

**[106]** Upon the oral application of learned counsel for the hospital, we ordered that the sum of RM6,037,600 together with interest which have been deposited under a previous order of the court, with the solicitors for the hospital, Messrs Chan Bee Eng & Co, to be released to the hospital.

*Deposits*

**[107]** The deposits for the four appeals are to be refunded to the respective appellants.

*Order accordingly.*

Reported by Ashok Kumar